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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 500

W. N. MOREHOUSE, EMERY TRANSPORTATION COMPANY, LITTLE AUDREY'S TRANSPORTATION COMPANY, INC., LEVER BROTHERS COMPANY, AND KRAFT FOODS, *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of Nebraska

BRIEF FOR THE APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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1. In an effort to foreclose plenary appellate review of the District Court's judgment in this case, the appellees offer the following "short answer" to the basic question involved in this litigation: "The short answer is that the term 'packinghouse products' is a description of the kind of commodity to be carried,

not of the class of shippers to be served. The appellant carriers are free to serve all shippers; . . . in serving such shippers, however, they may carry only the commodities they are authorized to transport, namely 'packinghouse products.' And, as noted, that term covers only products manufactured or distributed by packinghouses." (Motion to Affirm, pp. 6-7).

With all due respect, a semantic dodge will not serve to answer the basic question in this case. A somewhat longer and more complete answer is in order, and we submit that it can only come through plenary consideration by this Court.

The appellees do not deny the fundamental proposition that a common carrier, such as appellant Morehouse, may not lawfully be restricted as to the shippers it may serve. But through the guise of an interpretation of a commodity description so as to impose a built-in limitation on shippers, that is precisely what the Commission has done here and what the District Court has sanctioned.

To put a concrete illustration: Appellant Lever Brothers Company makes "Lifebuoy" soap. Armour & Company, part of whose business happens to be the slaughter of animals, makes the competing "Dial" soap. The Examiner, whose fact findings were affirmed by the Commission (81 M.C.C., at 615), found that products, such as soap, "produced and sold by Lever Brothers Company . . . are similar in all essential respects to those produced by meat packinghouses." (Ex'r's Rep., p. 4). Appellant Morehouse, under the Commission's interpretation, may carry "Dial" soap for Armour from the Chicago zone to an A&P warehouse in Omaha, but it may not carry "Lifebuoy" soap for Lever on the same journey to the same consignee.

Can the Commission's ruling as to "packinghouse products," which produces this result, rationally be said to be "a description of the kind of commodity to be carried, not of the class of shippers to be served"? Is Dial soap a different "kind of commodity" from Lifebuoy soap?

There is more. If a factory were to make the identical soap for Lever and for Armour, and sell it to them for distribution (whether under the same or varying labels), Armour could use appellant Morehouse's services in distributing the soap but appellant Lever could not. This is because the Commission says that soap becomes a "packinghouse product" when it is "*distributed*" by a meat packinghouse. Or to take a further example: if Lever made a certain soap, it could not, in distributing the soap itself, use appellant Morehouse's service; but if it sold the soap to its competitor Armour for distribution, appellant Morehouse then could carry it. These examples negate the appellees' bland assertion that all that is involved here is "a description of the kind of commodity to be carried, not of the class of shippers to be served".

2. The appellees' argument that commodity descriptions generally have the same meaning in contract carrier permits as in common carrier certificates is wide of the mark where, as here, the statute demands a contrary result. Where the Commission's interpretation of a commodity description is such as to impose a limitation on a carrier, restricting it to serving particular classes of shippers, it conflicts with the statutory standard defining *common* carriage, even though it may be permissible in respect to a *contract* carrier. See *Noble* v. *United States*, 319 U.S. 88 (1943). A common carrier must serve the public indiscriminately, while a contract carrier has no such obligation.

The appellees' Motion to Affirm makes it plain that the limitation involved here originated in the context of the regulation of *contract* carriers, (pp. 5 and 6), and is one designed to prevent the carrier from "*serving . . . other industries*" than the meat packers, even though, as the Motion to Affirm concedes, what is involved are "the same products" (p. 5). This cannot be done to a *common* carrier under the statute.

3. The appellees do not controvert the position taken in the Jurisdictional Statement (p. 7) that the question presented for judicial review in this case is one of first impression. The question whether the Commission may lawfully limit a common carrier to carrying certain products only where they have been produced or distributed by certain types of companies has never been determined by a court, prior to the District Court's ruling in this case. This question is not one of simple interpretation of a certificate, but rather of the Commission's power under the Act to impose a restriction of the sort implicit in its interpretation of "packinghouse products" here—a restriction which limits the common carrier's ability to perform its obligations under the Act and under its certificate.[1]

Clearly the question presented is substantial and apt to be recurring, as well as one of first impression. As the Motion implies (p. 4), the terminology in issue here occurs in a number of carriers' certificates. The authorities cited by the appellees in support of the cor-

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[1] One of the conditions imposed on appellant Morehouse's common carrier certificate, like all others issued by the Commission, is that the holder "shall render reasonably continuous and adequate service *to the public* . . ." (Certificate, Ex. B to Complaint, p. 2, emphasis supplied).

rectness of the District Court's ruling admittedly involve *contract* carriers rather than *common* carriers. (Motion, p. 7). The argumentative grounds of the appellees, given in support of the correctness of the District Court's ruling, are highly questionable as we have shown. In these circumstances probable jurisdiction should be noted.

CONCLUSION

The grounds stated in the Motion to Affirm for a preclusion of plenary appellate review are inadequate, as are the Motion's grounds for supporting the judgment below. For the reasons stated herein and in our Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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